

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SENSITECH INC. and DONALD W.
BERRIAN,

Plaintiffs,

vs.

TIME & TEMPERATURE COMPANY
d/b/a TIME 'N TEMPERATURE
CORPORATION

Defendant.

Case No. 04-11483MLW

DECLARATION OF STEPHEN DIRUBIO
IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS, OR, IN THE
ALTERNATIVE, TO TRANSFER VENUE

DECLARATION OF STEPHEN DIRUBIO

I, Stephen DiRubio, declare:

1. I am over the age of eighteen (18). I make this declaration of my own personal knowledge or on information and belief where so stated. If called as a witness, I could and would competently testify to the truth of the matters asserted herein.

2. I submit this declaration in support of Sensitech's Opposition to Defendant's Motion to Dismiss, or, in the Alternative, to Transfer Venue.

3. I am the Vice President and General Manager of Sensitech's Food Division. I have held the position of General Manager of the Food Division since January 2000 and was made a Vice President in August 2000.

4. This lawsuit involves electronic temperature monitoring devices that are used in shipping perishable goods, such as food items and pharmaceuticals. As Vice President and General Manager of the Food Division, I am responsible for sales and general business

management of Sensitech's temperature monitoring products in the domestic and Canadian food industry.

5. Sensitech sells a line of electronic temperature monitors called TempTale® monitors.

6. TnT also sells electronic temperature monitors under the names SmartChek, and QC Max, among others. (See printout from TnT's website, attached as Ex. A.)

7. It is well known in the food industry that perishable goods, such as fresh fruit and produce, can be damaged if they are exposed to temperatures above or below certain parameters during shipment.

8. For this reason, temperature monitors are traditionally used on trucks carrying perishable goods from a supplier, such as a grower of fresh produce (often called a "grower/shipper"), to a purchaser of those goods, such as a grocery store chain or food wholesaler (often called a "receiver"), to detect, record, and report temperatures experienced during shipment. It is common practice for receivers to require, as a condition of the purchase orders it issues, that a particular temperature monitor be placed on shipments and for a receiver to agree to reimburse the grower/shipper for the costs of the temperature monitor.

9. It is common practice for receivers to evaluate electronic temperature monitors, software, and associated services offered by various manufactures of such technology such as Sensitech and T'NT, to standardize its monitoring program on a particular brand of electronic monitoring device, and then to require that its perishable suppliers keep that particular brand of temperature monitor in stock and use it on all shipments to their warehouse.

10. Upon arrival of the shipping truck at the receiver's warehouse, receiving and inspection personnel will often check the temperature monitor in deciding whether to accept or reject the shipment of perishable goods.

11. Most of the electronic temperature monitors sold by Sensitech and TnT are single-use devices designed to be used for one shipment and then either discarded or recycled. Receivers who send used monitors back to the manufacturer for recycling receive rebates from the manufacturer for each returned unit.

12. Temperature monitors are sold directly to grower/shippers for use on shipments to receivers of perishable goods. Receivers often require such monitors on shipments destined for their warehouses and later reimburse the grower/shippers for the cost of the temperature monitor.

13. The majority of the TempTale electronic temperature monitors sold by Sensitech to produce growers and other shippers are purchased so that those shippers have them available for use on shipments to supermarket chains and other receivers that have made the affirmative decision to standardize their temperature monitoring program on Sensitech's TempTale monitors and software.

14. Based upon my experience and knowledge of the temperature monitoring industry, I believe that the majority of the single-use electronic temperature monitors sold by TnT to produce growers and other shippers are likewise purchased by those shippers to use on shipments to grocery chains and other receivers that have standardized their temperature monitoring program on TnT's monitoring products.

15. Upon information and belief, TnT has made direct arrangements with receivers of perishable goods whereby the receivers request that grower/shippers use TnT's monitors on shipments to that receiver. TnT has entered a number of such programs with receivers across the country, including accounts in Massachusetts, as reflected on the list of SmartChek users TnT faxed to perishable goods suppliers on March 22, 2002 attached as Exhibit A to the Declaration of David Vaught, Sensitech's Director of Sales for Supermarkets, who located this document in his files.

16. Upon information and belief, TnT sent "blast" faxes of this type to grower/shippers periodically to remind them to use SmartChek recorders on shipments headed for the receivers who had entered programs with TnT. This is reflected in the statement on the top of the list reading "Check this list for your customer's who request SmartChek digital recorders. Call 800-338-7295 to order."

17. This list shows that there were five accounts in Massachusetts that requested TnT's SmartChek digital recorders on their shipments: Alphas Chelsea-MA, Big Y Foods-MA, , C&S Wholesale-MA , Community Suffolk-MA, and Shaw's Supermarkets. Other stores on this list have a Massachusetts presence, such as Price Chopper, which has at least 12 stores in the Worcester area as well as stores in New York, Vermont, Connecticut, and Pennsylvania. (See printout from Price Chopper's website, Ex. B.)

18. Upon information and belief, the two largest companies of those five Massachusetts accounts are Shaw's Supermarkets and C&S Wholesale. Shaw's Supermarkets is a large New England-based grocery store chain headquartered in West Bridgewater, Massachusetts. (Ex. C, printouts from Shaw's website.) Since 1991, Shaw's has had a

distribution center in Methuen, Massachusetts, which is a cold storage facility that receives perishable goods shipments. (Ex C, printout from Shaw's website describing company history.)

19. C&S Wholesale is a large grocery distributor based in New England, which previously had its corporate headquarters in Brattleboro, Vermont and is now headquartered in Keene, New Hampshire. (Ex. D, printouts from C&S Wholesale's website.) At all relevant times C&S Wholesale has had facilities throughout New England, including three in Massachusetts (North Hatfield, South Hatfield, and Westfield). (Ex. E, printout from website showing warehouse locations.)

20. Based upon my experience and knowledge of the temperature monitor industry and Sensitech's experience with Shaw Supermarkets, which currently uses Sensitech temperature monitors, it is reasonable to estimate that TnT sold at least 1000, and perhaps as many as 1500, monitors per year as a direct result of the business agreement TnT reached with Shaw's to standardize its temperature monitoring on TnT technology.

21. Based upon my experience and knowledge of the temperature monitor industry, I reasonably believe that TnT would have records showing at least the following: marketing efforts directed toward Massachusetts receivers, including Shaw's, about entering a monitor program with TnT; documentation of sales calls or of the programs themselves; shipping/receiving records showing monitors that Massachusetts receivers returned to TnT, including returns from Shaw's Massachusetts distribution center; and accounting records showing recycling rebates issued to Massachusetts receivers, including to Shaw's at its Massachusetts headquarters.

22. TnT's website shows that TnT has international distributors of its products in many different countries (see attached printout, Exhibit F). An on-line industry advertisement states that "T N T products are distributed worldwide so contact us for agents in your area" and "Also we are always interested in developing new markets and distributors inquiries are welcome." (Food Online Time 'N Temperature Storefront, printout attached as Exhibit G.)

23. In addition to providing detailed product information, TnT's website also enables users of its monitors to download software for the SmartChek and QC Max monitors. (See attached printout, Exhibit H).

24. Sensitech is based in Massachusetts, where the company was founded and has its corporate headquarters (in Beverly), including 112 employees. Sensitech's senior management, officers, accounting, product development, assembly and engineering personnel are based in Beverly, Massachusetts. All of the engineering staff is located in Massachusetts and I am informed that 4 of the inventors named on patent at issue in this case live in Massachusetts; the other inventor lives in Maine. Product development, assembly and testing take place in Beverly, Massachusetts and documents relating to those activities are located in Massachusetts.

25. Sensitech has a small distribution depot in Fresno, California which has 1 full-time office manager/customer service representative, 1 full-time delivery driver, and 1 part-time shipping/inventory clerk. Sensitech has a similarly sized and staffed distribution depot in Upland, California and a two-person office in Davis, California having a field technician and a General Manager of Professional Services.

26. Sensitech has approximately 13 sales and field service representatives and contractors in both the food and life sciences (pharmaceutical) divisions working out of their

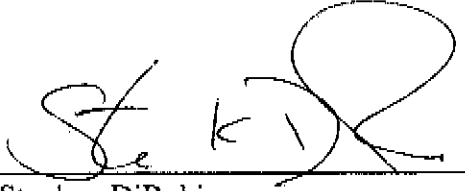
homes in various states, several of whom are located in California; these employees are balanced equally between the Eastern and Western parts of the United States.

27. To my knowledge, none of Sensitech's employees or representatives in California has any knowledge related to this patent infringement lawsuit.

28. Sensitech also has a manufacturing facility in Redmond, Washington where mechanical stripchart monitors are made. None of Sensitech's products embodying the patented invention are made, designed, or distributed out of the Redmond facility. Sales management for the food industry, including myself, is also based in Redmond, Washington, as are a few accounting personnel and a person in charge of quality control. I frequently travel to Massachusetts, on average once a month, to meet with corporate management and perform other duties of my job.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: August 20, 2004
Redmond, Washington



Stephen DiRubio